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SUPREME COURT, U.S.

No. 97-2014

In the

Supreme Court of the United States

October Term, 1997

ERIC WARNER, A MINOR, BY AND THROUGH LINDA WARNER, HIS MOTHER,

Petitioner,

v.

INDEPENDENT SCHOOL DISTRICT NO. 625, ST. PAUL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF AND APPENDIX IN OPPOSITION TO PETITION

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QUESTION PRESENTED

The hearing review officer (HRO) affirmed School District had provided Student with a free appropriate public education (FAPE) and had properly assessed Student's disability under the Individuals with Disabilities in Education Act (IDEA) and state law. It nevertheless ordered an independent assessment of Student under state law. The district court held Parent did not succeed on the actual merits of her claims but was still a "prevailing party" entitled to attorneys' fees under federal law, 20 U.S.C. § 1415(e)(4)(B) (1994), because the HRO's order materially altered the parties' legal relationship. The question presented is:

> Whether the Eighth Circuit properly concluded Parent was not a "prevailing party" entitled to attorneys' fees under federal law, 20 U.S.C. § 1415(e)(4)(B) (1994).

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The opinion of the court of appeals (A-3--A-15) is reported at 134 F.3d 1333 (8th Cir. 1998). The opinion of the district court (A-16--A-43) is reported at 26 IDELR 831 (D. Minn. 1996). The opinion of the hearing review officer (A-46--A-73) is not reported.

STATUTES AND REGULATIONS INVOLVED

This case involves 20 U.S.C. § 1415 (1994) of the Individuals with Disabilities in Education Act (IDEA) (A-74--A-79); Minn. Stat. § 120.17, subd. 3b (1994) (R. App. 1--R. App. 5); Minn. R. 3525.4000 (1995) and Minn. R. 3525.3300 D (1995) (R. App. 6).

Minnesota Rule 3525.4000 (1995) provides in relevant part: "If a hearing officer requests an independent educational assessment of a child . . ., the cost of the assessment shall be at district expense."

STATEMENT OF THE CASE

Most pertinent facts are set out in the court of appeals' decision (A-4--A-7) and are thus incorporated by reference. Still, certain facts must be highlighted.

Parent Linda Warner's initial request for a due process hearing alleged violations of IDEA, 20 U.S.C. § 1400 *et seq.* (1994), and Minnesota law, Minn. Stat. § 120.17 (1994) and Minn. R. 3525.0000 *et seq.* She claimed Student had been improperly classified as having an emotional or behavioral disorder (E/BD), had been denied a free appropriate public education (FAPE), and was thus entitled to an award of private school expenses. (A-5). Pursuant to 20 U.S.C. § 1415(e)(4)(D)(1994), the School District made a settlement offer (1) of $5000 to settle all Parent's monetary claims, (2) to place Student in an appropriate public educational placement in a Twin Cities' area public school of Parent's choice based

upon space availability or to provide Student with special education services at a private school selected and paid for by his Parent, (3) to classify Student as Other Health Impaired ("OHI") on his individualized education plan (IEP), and (4) to pay $3000 for attorneys' fees and costs. (A-41). Parent rejected this offer. (A-12). After a nine-day due process hearing, the hearing officer rejected all of Parent's claims and concluded that the School District had provided FAPE. (A-5). Parent appealed. Id.

Contrary to Parent's assertion (Petition at 1), the hearing review officer (HRO) ruled in the School District's favor. He affirmed the hearing officer's decision in all matters relevant to the instant decision. (A-70). Relying on Minnesota Rule 3525.4000 (1995) (A-66), the HRO also ordered the School District to conduct an independent assessment of Student, applying state criteria. (A-71--A-72). The HRO expressly ruled the assessment results would not affect his conclusion or the conclusion below that the School District properly classified Student's disability as E/BD. (A-67). Neither party appealed, and that decision became final. (A-6).

Parent then filed this action for attorneys' fees under 20 U.S.C. § 1415(e)(4)(B) (1994), seeking fees of over $158,000, and expert witness fees of $5,420. Parent claimed, among other things, that the independent assessment order made her a "prevailing party." The School District denied Parent was a prevailing party and contended the fees were unreasonable. Upon the parties' cross-motions for summary judgment, the district court acknowledged "plaintiff did not succeed on any significant legal issue or, . . . 'on the actual merits of the claim or the relief sought.'" (A-31--A-32). It nevertheless awarded attorneys' fees because the HRO's order "materially altered the legal relationship of the parties." (A-8, A-31). Finding the fees "far in excess of a reasonable amount in light of the results obtained," the district court reduced the attorneys' fees to $63,501.45.

The Eighth Circuit reversed. Applying this Court's precedents, it held Parent was not entitled to any attorneys'

fees. It ruled, despite the independent assessment order, Parent was not a "prevailing party" because she lost on the merits of her IDEA claims. (A-10). It also stated if she were an IDEA prevailing party, the court would substantially reduce the award because the relief did not provide direct and immediate benefit to Student. Rather, it was designed to encourage and facilitate Student's reentry into public school. Finally, it noted the School District had made an offer of settlement in accordance with 20 U.S.C. § 1415(e)(4)(D) (1994) which Parent rejected "at her own financial risk, including the risk of paying her own attorneys' fees to pursue IDEA claims that ultimately failed." (A-12).

REASONS FOR DENYING THE PETITION

I. Because the Eighth Circuit's Decision Is Consistent With Settled Law, the Petition Should be Denied.

To be awarded attorneys' fees under IDEA, Parent must meet a two-part test: First, she must establish she is "prevailing party" under 20 U.S.C. § 1415(e)(4)(B)(1994). Second, she must establish the fees sought are reasonable. Id. Parent only challenges the Eighth Circuit's decision that she was not a "prevailing party." She does not challenge the court's decision (A-11) that the fees awarded were excessive.

A. The Eighth Circuit's "prevailing party" decision is consistent with this Court's decisions.

The Eighth Circuit's decision is consistent with a long-line of attorneys' fees cases out of this Court discussing who is a "prevailing party." In Hewitt v. Helms, 482 U.S. 755, 760 (1987), this Court declared: "Respect for ordinary language requires that a plaintiff receive at least some relief ***on the merits of his claim*** before he can be said to prevail." (Emphasis added). This Court cited this same language with approval in Texas State Teachers Ass'n v. Garland Indep.

School Dist., 489 U.S. 782, 791 (1989), explaining a "prevailing party" is "one who has ***succeeded on any significant claim*** affording it some of the relief sought." Id. (emphasis added). In Farrar v. Hobby, this Court reiterated "to qualify as a prevailing party, a civil rights plaintiff must obtain ***at least some relief on the merits*** of his claim." 506 U.S. 103, 111 (1992) (emphasis added).

> [A] plaintiff "prevails" when ***actual relief on the merits of his claim*** materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.

Id. at 111-112 (emphasis added). Relying on these cases, the Eighth Circuit properly reversed the district court. These cases mandate that a plaintiff receive at least some relief on the merits of her claims. As the district court acknowledged and is undisputed, however, Parent received no relief on the merits of her claims. "[H]er IDEA claims were unsound." (A-12).

Ignoring the legal requirement of success on the merits, Parent contends, and the district court agreed, that a "material alteration in the parties' legal relationship" is a sufficient basis to make a plaintiff a "prevailing party." The appellate court correctly rejected a prevailing-party test based solely on this language. Acknowledging the existence of the "material alteration" language in this Court's opinions, the Eighth Circuit stated this language

> is the standard by which the Court measures how much relief on the merits is sufficient to justify at least a partial fee award; it is not a basis for awarding fees to a plaintiff who did not prevail on the merits of any claim under the fee-shifting statute in question.

(A-8).

Claiming the Eighth Circuit's interpretation conflicts with Farrar and Garland, Parent brings this Petition. What the Eighth Circuit meant by its interpretation is not entirely clear. On the one hand, the court may have meant that to prevail, plaintiff must show not only that she received relief on the merits of her claim but also that the relief was "material."[1] On the other hand, it may have meant that materiality goes to the reasonableness of the fee.[2] Either way, no compelling reason

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[1] Support for this interpretation is found in Farrar and Garland. In Garland, this Court held to cross the prevailing-party threshold, the plaintiff must have succeeded on a significant issue in litigation which achieved some of the benefit the party sought in bringing suit. It noted "the floor in this regard" is provided by the Hewitt v. Helms decision, in which this Court recognized "a party who litigates to judgment and loses on all of his claims . . . [cannot] be a 'prevailing party'," 482 U.S. 755, 757. Garland, 489 U.S. at 792. While this Court made its first reference to a "material alteration of the legal relationship" in Garland, id., nowhere did the Court indicate it was abandoning its long-standing requirement that plaintiff receive some success on the merits of plaintiff's claims. Indeed, in Farrar, this Court again recognized that the plaintiff must receive "actual relief on the merits of his claim." 506 U.S. at 111. Such relief must also "materially alter[] the legal relationship between the parties." Id. This language may imply that an "immaterial alteration" will not make a party "prevail." For example, while Hewitt received a favorable judicial ruling that his constitutional rights were violated, that ruling did not make him a prevailing party because he did not get relief on any of his claims. In other words, that favorable ruling or "relief" was "not material."

[2] The Garland Court discussed a "material alteration in the legal relationship" in the context of whether the "plaintiff's success on a legal claim [could] be characterized as purely technical or *de minimis*." 489 U.S. at 792. Then, in Farrar, Justice O'Connor noted:

> While Garland may be read as indicating that this *de minimis* or technical victory exclusion is a second barrier to prevailing party status, the Court makes clear today that, in fact, it is part of the determination of what constitutes a reasonable fee. . . . When the plaintiff's success is purely technical or *de minimis*, no fees can be awarded.

exists to grant the Petition. The court's interpretation is consistent with the referenced cases. The result here would be the same even if the court had made no attempt to explain the "material-alteration" language because Parent did not prevail on any of her claims, as this Court has consistently required.

The Eighth Circuit correctly rejected the argument that a "material alteration in the parties' legal relationship" is a litmus test to determine who is a prevailing party. Rather to cross the prevailing-party threshold, plaintiff must show ***at least*** some success on the merits of the party's claims.[3] The law still provides that "a party who litigates to judgment and loses on all of his claims . . . [cannot] be a 'prevailing party' for purposes of an award of attorney's fees." Hewitt, 482 U.S. at 757; A.J. by L.B. v. Kierst, 56 F.3d 849, 865 (8th Cir. 1995).

B. A "material-alteration test" would lead to absurd results.

This Court has never held a "material alteration in the parties' legal relationship" is sufficient to make a party a "prevailing party." To adopt this test would lead to absurd results. Suppose a school district wanted to perform an assessment, for example, and the parent refused permission.

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506 U.S. at 117 (O'Connor, J., concurring). Consistent with this reading, she rejected the notion that Farrar's success was "material" simply because he got one seventeenth millionth of what he sought. Id. at 121-22.

[3] "At least" is used here because other factors bear on whether the party has prevailed. For example, this Court has looked at whether (1) the "defendant's behavior [has been modified] in a way that directly benefits the plaintiff," (2) the "relief . . . directly benefit[ed] [plaintiff] at the time of the judgment or settlement," (3) plaintiff is "entitled to enforce a judgment, consent decree or settlement against defendant," (4) "plaintiff can point to the resolution of the dispute," and (5) plaintiff got "some of the relief sought." Farrar, 506 U.S. at 110-12; Garland, 489 U.S. at 791-92; Hewitt, 482 U.S. at 764. Parent did not satisfy any of these other factors either.

If the school district pursued this issue in a due process hearing and an assessment were ordered, the parent could claim the parent "prevailed" because the order for assessment would result in a "material alteration in the parties' legal relationship." This is an absurd result because the parent ***opposed*** the assessment, lost on her claim, and did not get what she wanted ***in substance***. On the other hand, the school district got what it sought--the assessment--but would be forced to pay the parent's attorneys' fees.

C. Additional grounds support the decision.

Additional bases support the Eighth Circuit's decision to deny fees altogether. "In some circumstances, even a plaintiff who formally 'prevails' . . . should receive no attorney's fees at all." Farrar, 506 U.S. at 115.

The Eighth Circuit suggested it would deny all fees even if Parent were a "prevailing party." The court held the relief ordered by the HRO did not directly benefit Student at the time of judgment, as required by Farrar, 506 U.S. at 111, and Hewitt, 482 U.S. at 764. The independent assessment was designed to encourage Parent to return Student to public school. Merely facilitating reentry into public school is not enough to make Parent a "prevailing party." (A-11). Jodlowski v. Valley View Community Unity School Dist. No.365-U, 109 F.3d 1250, 1254 (7th Cir. 1997).

Furthermore, the relief ordered "differed very little from what the School District voluntarily offered in settlement before the administrative hearing." (A-11). In agreeing with the School District that the fees awarded were excessive, it cited Parents of Student W. v. Puyallup School Dist., 31 F.3d 1489, 1498 (9th Cir. 1994), and Johnson v. Bismarck Pub. School Dist., 949 F.2d 1000, 1003-04 (8th Cir. 1991). In both cases, the parents formally prevailed but the courts denied attorneys' fees.

As the court hinted, denial of fees would also be proper under 20 U.S.C. § 1415(e)(4)(D) and (F) (1994). (A-13).

Under (D), fees should be denied where the school district's settlement offer is more favorable than the relief obtained. The record reflects the school district's offer was more favorable than what Parent ultimately received. The District previously offered everything ordered by the HRO, except the assessment. In fact, it offered more, including $5000 for all monetary claims and $3000 for attorneys' fees. Parent got none of this relief from the HRO. Under (F), fees should be denied where the parent unreasonably protracts the final resolution or the fees are excessive given the nature of the proceedings. The proceedings were unreasonably protracted and the fees here were excessive because no hearing was necessary to get an independent assessment. Parent could have requested and obtained an independent assessment at any time, and the School District would have had to pay for it unless it contested the assessment at a hearing. Minn. R. 3525.3300 D (1995); 34 C.F.R. § 300.503(b) (1995). Parent never did request such an assessment. (A-32 & n. 4) Ruling against Parent, the Eighth Circuit held, "Warner turned down the School District's IDEA-complying settlement offer and placed Eric in private school . . . at her own financial risk, including the risk of paying her own attorneys' fees to pursue IDEA claims that ultimately failed." (A-12).

Other bases, not ruled on by the Eighth Circuit, also support the denial of fees. An award of something Parent did not seek and which the School District did not deny does not support prevailing-party status. See e.g., Garland, 489 U.S. at 791 (party must get some relief sought); Parents of Student W., 31 F.3d at 1498 (parents did not get any of eight types of relief requested); Combs v. School Dist. of Rockingham County, 15 F.3d 357, 363 (4th Cir. 1994) (award of additional therapy not previously requested did not make parent prevailing party). Parent has also failed to establish a causal connection between the relief obtained and the administrative proceedings and that the relief would not have been provided without the proceedings. See Payne v. Board of Educ., Cleveland City Schools, 88 F.3d 392, 399 (6th Cir. 1996);

DeGuido v. Pung, 920 F.2d 525, 528 (8th Cir. 1990). Where, as here, the relief was not provided to remedy a legal violation and was available without resorting to a hearing, the relief is gratuitous or of *de minimis* benefit and does not entitle the parent to fees. See Combs, 15 F.3d at 364; Urban by Urban v. Jefferson County School Dist. R-1, 89 F.3d 720, 729 (10th Cir. 1996) (parent denied all fees, though he received some relief he sought, but did not receive placement at neighborhood school). Because ample law supports the Eighth Circuit's decision, the case is unworthy of review.

II. This Case Presents No Issues of General Importance Because the Law Upon Which Parent Relies Has Been Amended.

The law upon which Parent relies has been amended. Under current law, as amended, a similarly-situated parent would not be entitled to any attorneys' fees. Given the change, this case presents a legal issue of significance only to the parties and not worthy of review.

Effective August 1, 1995, after the commencement of the due process hearing, the following law became applicable:

> Within five business days after the request for a hearing, or as directed by the hearing officer, the objecting party shall provide the other party with a brief written statement of particulars of the objections, the reasons for the objection, ***and the specific remedies sought***.

1995 Minn. Laws ch. 3, art. 3, § 2 (codified at Minn. Stat. § 120.17, subd. 3b(e) (1996)) (emphasis added). Effective June 4, 1997, section 1415 of IDEA was amended as follows:

> The procedures required by this section shall include--
> . . .

(7) procedures that require the parent of a child with a disability, or the attorney representing the child, to provide notice (which shall remain confidential)--

(A) to the State educational agency or local educational agency, as the case may be, in the complaint filed under paragraph (6); and

(B) that shall include--

(i) the name of the child, the address of the residence of the child, and the name of the school the child is attending;

(ii) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

(iii) ***a proposed resolution of the problem*** to the extent known and available to the parents at the time.

20 U.S.C.A. § 1415(b)(7)(1998 Supp.) (emphasis added). More important, a provision was added requiring attorneys' fees to be reduced if the attorney representing the parents did not provide, among other things, "a proposed resolution of the problem." The law states:

> If the court finds that the "attorney representing the parent did not provide to the school district the appropriate information in the due process complaint ***in accordance with subsection (b)(7)***. . . the court ***shall reduce***, accordingly, the amount of the attorneys' fees awarded" under 20 U.S.C. § 1415.

20 U.S.C.A. § 1415(i)(3)(F)(iv)(1998 Supp.) (emphasis added).

Although this law became applicable after Parent commenced this attorneys' fees action, the change emphasizes the insignificance of the instant case. Congress intends that fees should not be awarded automatically, even if the parent prevails. Rather, parents will be expected to propose a resolution. If they fail to do so and get some arguable benefit

not proposed, as in this case, attorneys' fees will presumably be reduced and may be denied altogether.

Given these amendments, the Petition should be denied. Little purpose would be served by having this Court provide guidance on an out-dated, less specific version of the law which has no bearing on cases filed within the last year or more and which has no future application. See Bradley v. School Board of Richmond, 416 U.S. 696, 711 (1974).

III. Parent's Other Bases for Review Are Meritless.

A. The assessment ordered pursuant to Minnesota law did not entitle parent to fees under federal law.

The Eighth Circuit also denied fees relying on an analogy to federal civil rights cases in which the court renders judgment against plaintiff on federal claims but grants relief under pendent state claims. In those cases, courts uniformly deny attorneys' fees under 42 U.S.C. § 1988. See National Org. for Women v. Operation Rescue, 37 F.3d 646, 653-54 (D.C. Cir. 1994); Mateyko v. Felix, 924 F.2d 824, 828 (9th Cir. 1990), cert. denied, 502 U.S. 814 (1991).

Despite Parent's objection, this analogy was properly applied here. The Minnesota hearing officers were charged with enforcing state law, as well as IDEA. (A-9). In ordering an assessment, however, the HRO expressly relied on state law, Minn. R. 3525.4000 (1995). (A-9 & n. 3). In addition, the HRO rejected the IDEA claims. Thus, as the court noted, this situation is much like cases in which the plaintiff prevails on a related pendent state claim but loses on the federal claim and cannot therefore recover fees under federal law.

Parent's contention that this analogy is inapposite because she brought only one claim--a claim under IDEA (Petition at 4)--is contrary to the record. Parent relied heavily on state law and claims. (See e.g., Complaint, ¶ 8; Appellant's Appendix Vol. I in Eighth Circuit at Ap-299-309). Her

Complaint admits alleging violations of Minnesota Statutes §§ 120.17, 127.03, and Minnesota Rules in the administrative proceedings. (Complaint, ¶ 8). In arguing the inappropriateness of Student's disability classification in the administrative proceedings, Parent relied on Minnesota Rules which define various disability categories. (See Appellant's Appendix Vol. I in Eighth Circuit at Ap-369, 374, 376).

Now, however, Parent seems to argue the HRO made an error of law when he issued his order relying on state law and should have relied on federal law. Because she did not appeal that order, she has not properly preserved this claim. That order is final. 20 U.S.C. § 1415(e)(1)(1994); Minn. Stat. § 120.17, subd. 3b(h)(1994). (A-6). The HRO's legal conclusions are binding. See Plough v. West Des Moines Community School Dist., 70 F.3d 512, 515 & n. 6 (8th Cir. 1995); Yancy v. McDevitt, 802 F.2d 1025, 1028 (8th Cir. 1986). No reversible error exits where complainant, as here, has invited the error by propounding law which she now claims is inapplicable. See City of Springfield v. Kibbe, 480 U.S. 257, 258 (1987); Dillon v. Nissan Motor Co., Ltd., 986 F.2d 263, 270 (8th Cir. 1993).

The fact that an independent assessment might also have been available under IDEA's implementing regulations, as Parent and the dissent now argue, is irrelevant and does not entitle Parent to fees under IDEA. The assessment was ordered ***after*** Parent lost on her IDEA claims. "[W]here it is clear that the claims that provide for attorneys' fees had nothing to do with plaintiff's success, Hensley v. Eckerhart [461 U.S. 424 (1983)] requires that fees not be awarded on the basis of those claims." Smith v. Robinson, 468 U.S. 992, 1009 & n. 12 (1984). Moreover, for the reasons stated above, the HRO's legal conclusions cannot be rewritten now to be premised on federal law simply because Parent deems it expedient. To permit such, would render the finality of all special education decisions in doubt.

As the Eighth Circuit noted, Minnesota law makes no provision for attorneys' fees in special education cases. (A-9).

Because the independent assessment order was based on state law, the Eighth Circuit properly refused to award fees under IDEA.

Finally, the analogy to pendent state claims is just that--an analogy. Parent's lack of success on the merits of her claims, as well as other grounds mentioned herein, amply support the decision. The decision does not stand or fall on the basis of this analogy. Thus, the Petition should be denied as meritless.

B. The decision is not contrary to IDEA's intent.

Contrary to Parent's contention, the decision does not "undermine the intent of IDEA as a remedial statute that protects and vindicates the education rights of disabled children" or discourage plaintiffs from asserting their IDEA rights. (Petition at 4). In the proceedings below, which Parent did not appeal, it was determined the School District had provided Student with FAPE and had properly assessed his disability. Accordingly, this case is not important to protect Student's rights, let alone all disabled children. Moreover, this case does not warrant this Court's attention unless, of course, a parent who loses her federal claims is nevertheless a "prevailing-party" because she obtained relief under state law which was never sought from or denied by the school district.

Where, as here, a student has been provided with FAPE, parents should not be able to recover attorneys' fees. Fairness to students in real need of educational services demands that this litigation stop now. Denying the Petition will further IDEA's intent to ensure that school districts have sufficient resources to provide FAPE to ***all*** disabled students, 20 U.S.C.A. § 1400(d)(1)(C) (1998 Supp.). It will also finally end the ongoing waste of money needed to defend against litigation intended to enrich one parent and a team of lawyers to the disadvantage of all students.

CONCLUSION

For the foregoing reasons, the School District respectfully requests that the Petition for Writ of Certiorari be denied.

Date: July 13, 1998

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Minnesota Statutes § 120.17 (1994):

* * *

Subd. 3b. **Procedures for decisions.** Every district shall utilize at least the following procedures for decisions involving identification, assessment, and educational placement of children with a disability:

(a) Parents and guardians shall receive prior written notice of

(1) any proposed formal educational assessment or proposed denial of a formal educational assessment of their child;

(2) a proposed placement of their child in, transfer from or to, or denial of placement in a special education program; or

(3) the proposed provision, addition, denial or removal of special education services for their child;

(b) The district shall not proceed with the initial formal assessment of a child, the initial placement of a child in a special education program, or the initial provision of special education services for a child without the prior written consent of the child's parent or guardian. The refusal of a parent or guardian to consent may be overridden by the decision in a hearing held pursuant to clause (e) at the district's initiative;

(c) Parents and guardians shall have an opportunity to meet with appropriate district staff in at least one conciliation conference if they object to any proposal of which they are notified pursuant to clause (a). The conciliation process shall not be used to deny or delay a parent or guardian's right to a due process hearing. If the parent or guardian refuses efforts by the district to conciliate the dispute with the school district, the requirement of an opportunity for conciliation shall be deemed to be satisfied;

(d) The commissioner shall establish a mediation process to assist parents, school districts, or other parties to resolve disputes

arising out of the identification, assessment, or educational placement of children with a disability. The mediation process must be offered as an informal alternative to the due process hearing provided under clause (e), but must not be used to deny or postpone the opportunity of a parent or guardian to obtain a due process hearing.

(e) Parents, guardians, and the district shall have an opportunity to obtain an impartial due process hearing initiated and conducted by and in the school district responsible for assuring that an appropriate program is provided in accordance with state board rules, if the parent or guardian continues to object to:

(1) a proposed formal educational assessment or proposed denial of a formal educational assessment of their child;

(2) the proposed placement of their child in, or transfer of their child to a special education program;

(3) the proposed denial of placement of their child in a special education program or the transfer of their child from a special education program;

(4) the proposed provision or addition of special education services for their child; or

(5) the proposed denial or removal of special education services for their child.

At least five calendar days before the hearing, the objecting party shall provide the other party with a brief written statement of the objection and the reasons for the objection.

The hearing shall take place before an impartial hearing officer mutually agreed to by the school board and the parent or guardian. If the school board and the parent or guardian are unable to agree on a hearing officer, the school board shall request the commissioner to appoint a hearing officer. The hearing officer shall not be a school board member or employee of the school district where the child resides or of the child's school district of residence, an employee of any other public agency involved in the

education or care of the child, or any person with a personal or professional interest which would conflict with the person's objectivity at the hearing. A person who otherwise qualifies as a hearing officer is not an employee of the district solely because the person is paid by the district to serve as a hearing officer. If the hearing officer requests an independent educational assessment of a child, the cost of the assessment shall be at district expense. The proceedings shall be recorded and preserved, at the expense of the school district, pending ultimate disposition of the action.

(f) The decision of the hearing officer pursuant to clause (e) shall be rendered not more than 45 calendar days from the date of the receipt of the request for the hearing. A hearing officer may grant specific extensions of time beyond the 45-day period at the request of either party. The decision of the hearing officer shall be binding on all parties unless appealed to the hearing review officer by the parent, guardian, or the school board of the district where the child resides pursuant to clause (g).

The local decision shall:

(1) be in writing;

(2) state the controlling facts upon which the decision is made in sufficient detail to apprise the parties and the hearing review officer of the basis and reason for the decision;

(3) state whether the special education program or special education services appropriate to the child's needs can be reasonably provided within the resources available to the responsible district or districts;

(4) state the amount and source of any additional district expenditure necessary to implement the decision; and

(5) be based on the standards set forth in subdivision 3a and the rules of the state board.

(g) Any local decision issued pursuant to clauses (e) and (f) may be appealed to the hearing review officer within 30 calendar days of receipt of that written decision, by the parent, guardian, or

the school board of the district responsible for assuring that an appropriate program is provided in accordance with state board rules.

If the decision is appealed, a written transcript of the hearing shall be made by the school district and shall be accessible to the parties involved within five calendar days of the filing of the appeal. The hearing review officer shall issue a final independent decision based on an impartial review of the local decision and the entire record within 30 calendar days after the filing of the appeal. The hearing review officer shall seek additional evidence if necessary and may afford the parties an opportunity for written or oral argument; provided any hearing held to seek additional evidence shall be an impartial due process hearing but shall be deemed not to be a contested case hearing for purposes of chapter 14. The hearing review officer may grant specific extensions of time beyond the 30-day period at the request of any party.

The final decision shall:

(1) be in writing;

(2) include findings and conclusions; and

(3) be based upon the standards set forth in subdivision 3a and ~~in~~ the rules of the state board.

(h) The decision of the hearing review officer shall be final unless appealed by the parent or guardian or school board to the court of appeals. The judicial review shall be in accordance with chapter 14.

(i) The commissioner of education shall select an individual who has the qualifications enumerated in this paragraph to serve as the hearing review officer:

(1) the individual must be knowledgeable and impartial;

(2) the individual must not have a personal interest in or specific involvement with the student who is a party to the hearing;

(3) the individual must not have been employed as an administrator by the district that is a party to the hearing;

(4) the individual must not have been involved in the selection of the administrators of the district that is a party to the hearing;

(5) the individual must not have a personal, economic, or professional interest in the outcome of the hearing other than the proper administration of the federal and state laws, rules, and policies;

(6) the individual must not have substantial involvement in the development of a state or local policy or procedures that are challenged in the appeal; and

(7) the individual is not a current employee or board member of a Minnesota public school district, education district, intermediate unit or regional education agency, the state department of education, the state board of education, or a parent advocacy organization or group.

(j) In all appeals, the parent or guardian of the pupil with a disability or the district that is a party to the hearing may challenge the impartiality or competence of the proposed hearing review officer by applying to the state board of education.

(k) Pending the completion of proceedings pursuant to this subdivision, unless the district and the parent or guardian of the child agree otherwise, the child shall remain in the child's current educational placement and shall not be denied initial admission to school.

(l) The child's school district of residence, a resident district, and providing district shall receive notice of and may be a party to any hearings or appeals under this subdivision.

3525.3300 CONTENTS OF NOTICE.

Notices must be sufficiently detailed and precise to constitute adequate notice for hearing of the proposed action and contain a full explanation of the procedural safeguards available to parents under parts 3525.0200 to 3525.4700. Notices must:

* * *

D. Inform the parents that they may:

(1) Obtain an independent assessment at their own expense.

(2) Request from the district information about where an independent assessment may be obtained.

(3) Obtain an independent assessment at public expense if the parent disagrees with an assessment obtained by the district. The district shall initiate conciliation and a due process hearing if necessary when refusing a parent's request for an independent assessment at public expense. If the hearing officer determines that the district's assessment is appropriate, the parents still have the right to an independent assessment, but not at public expense. When an independent evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria the district uses when it initiates an evaluation.